

Eastham Conservation Commission

555 Old Orchard Road
Eastham, MA 02642



508-240-5971
Fax 508-240-6687

**Eastham Conservation Commission
2500 State Highway
Earle Mountain Room
October 28, 2014
Public Hearing
MINUTES**

Commissioners Present: Chair Stephen Smith, Michael Harnett, Steven LaBranche, Mary Zdanowicz, James Baughman and Steven Kleinberg.

Commissioners Not Present: Linda Haspel.

Staff Present: Shana Brogan.

Also Present: Representing the Town of Orleans Attorney Michael Ford, Bird Monitor Paul Whiteman, Natural Resource Officer Nathan Sears and Conservation Agent John Jannell. Neil Andres of Town of Eastham Department of Public Works, Attorney Ben Zhender, Tim Klink of Coastal Land Design, Jason Ellis of J.C. Ellis Design, Mark Faherty of Mass Audubon, Attorney Amy Kwesell, Attorney Sarah Turano-Flores, Russell Sandblom, Peter Burns, Bill Van Norman, James Bright, Gail and Robert Bedoukian.

6:05 PM
Chair Smith opened the hearing.

Continuation of Notice of Intent filed by the Town of Orleans. Applicant proposes operation and management of an off-road vehicle (ORV) program for up to two hundred vehicles to drive and park on Nauset beach barrier beach, Eastham, Map 26A and 27A.

Michael Ford Orleans Town Counsel represented the project and noted that two members of the Orleans Board of Selectmen were also present. The Orleans Natural Resource Officer Nathan Sears and Conservation Agent John Jannell were also present. Attorney Ford noted that there was no alternatives analysis review necessary. He also addressed Exhibit A and noted they added language for an annual review with Eastham every April. He noted that even though the guidelines call for a ten foot ORV corridor, that they have called for fifteen foot corridor, because the toe of the dune grows during the summer. Attorney Ford said they have no objection if there is an additional condition for ongoing monitoring of the toe of the dune with the Conservation Agent and will act according.

Attorney Ford noted that the commission had expressed concern about the terminus of the beach. He also noted that the commission said the use was inconsistent with the prohibition that was in place. Attorney Ford said they have modified the project so the end of the beach is off limits completely and they will recognize they did have vehicles out there before Eastham issued the cease and desist order. They will not allow any driving on the westerly side of the beach. They will have symbolic fencing and it will be documented in their regulation that no one is allowed to drive on the terminus of the beach.

Attorney Ford noted that beach logs were requested and they can provide additional logs if necessary. He also provided bird log figures and said there was similar success and failure for plovers on Coast Guard Beach and the Spit itself. There is a serious predation problem for the plovers. Attorney Ford also noted he has not found a correlation for success or non success on beaches with or without an off- road vehicle (ORV) program.

Attorney Ford addressed the question of performance standards for the shorebirds protection. He noted the Division of Fisheries and Wildlife had submitted a report that Orleans did meet the performance standards and that the wildlife are protected under the Wetlands Protection Act. They reviewed Orleans' ORV program and said it would not have any adverse effects on wildlife. It also stated that the project would not result in a take, under the Endangered Species Act. Attorney Ford noted that the Natural Resources works well with the Division of Fisheries and Wildlife and does not hesitate to call on them when they have any questions.

Attorney Ford addressed the commission's question of what precedent is there for having a non expiring Order of Conditions. Attorney Ford noted that the south beach order is non expiring. He said that over time there has never been a problem with the Department of Environmental Protection and they do not have any concerns. He noted the condition worked for the town and that the annual beach meetings were important so any issues or changes that need to happen could be addressed at that meeting.

Chairman Smith noted he appreciated Mr. Ford's opinion on the buffer zone and alternatives analysis, but disagreed. He did note that an annual meeting with the commission would not be enough. He expressed concern about the toe of the dune, because he saw town vehicles were driving in the dune at an angle, which proves it was the toe of the dune. Chairman Smith also said that Orleans ownership of the spit was still a concern. He also made a case on the alternatives. He said cars are in the path of the foraging and the resting area and it could become a problem. Chairman Smith said that just because the program meets the performance standards does not mean it is the best thing for the resource area of the wildlife. Attorney Ford noted they can work on a condition that the symbolic fencing is annually reviewed.

Attorney Ford noted the management plan states that when chicks hatch the beach is closed and there will be no vehicles. He also noted that a September 23, 2014 letter requested they need to show a color of title, and said they leave property disputes to the cases involved. He said people use the beaches and they can work on a condition that the symbolic fencing is annually reviewed.

Michael Harnett asked if the Nauset Spit was closed at anytime this year. Nathan Sears noted that there were no closures due to chicks this year, but last year they did have a

brood that closed the south beach mid-June through mid-August. Mr. Harnett asked who will inspect the habitat areas for the birds. Mr. Sears noted there would be an annual review near April 1st from the state and federal biologist and they will review the area with a site visit. Mr. Harnett would like to know where the nests are on GIS mapping for the past few years. Attorney Ford said he will provide the GIS mapping of the birds at the next meeting. Mr. Harnett also asked for more logs of enforcement. He would like to see more than verbal reprimands and is looking for more enforcement. Mr. Sears noted he did issue a one hundred dollar fine to someone for driving on the spit, and he will provide that information and any other enforcement violations.

Mary Zdanowicz would like more frequent review of the dune and documentation of the review added to the management plan. Mr. Harnett requested more qualifications on the person who is familiar with the nesting habitat. Ms. Zdanowicz asked if it would be difficult to remove the posts. Attorney Ford said they would frequently review the toe of the dune when the beach is closed.

Michael Harnett **MOVED** to continue to November 25, 2015, Steven Klinberg **SECONDED.**

ALL IN FAVOR.

Request for Amended Order of Conditions filed by the Town of Eastham. Applicant proposes vehicular access over First Encounter Beach and tidal areas to shellfish aquaculture growing sites from October through May at property located at First Encounter Beach, Map 16, Parcel 025.

Peter Burns a grant holder, Mark Faherty of Mass Audubon, and Neil Andres of the Town of Eastham Department of Public Works was present to speak to the project. Peter Burns noted when the Notice of Intent was put forward there were some issues with shorebird protection. The Board of Selectmen had voted to endorse this, but the problem was Eastham Natural Resources Office has no staff for shorebird monitoring. Peter Burns made note of the ATV travel route and showed how they would proceed to first main sand bar. Mr. Burns noted the grant holders are looking for access for October, November, April and May. He also noted that the last plover nest in that area was in 2009. He went over details for plovers in the area and noted they are not common. He also noted there is excessive use of the beach by dogs. Mr. Burns said the grant holders are more than willing to pay the expenses for bird monitoring. He also noted the protocol if a bird did show up would be to stop driving out there. Mr. Burns said they would drive in the outwash plain near Bee's River. He then noted the birds stay up at the beach by the wrack line.

Mr. Burns showed the marsh area and how they would use it. He said they would not be spending as much time in the marsh. He noted two and half hours a week is spent on the ATV with an average of five to seven minutes out there. Mr. Burns said they are not trying to open the flood gates for the use of ATV's on beaches. He pointed out that only four grant holders have ATV's at this point. He passed out tide charts for this month to all grant holders and noted they are limited to daylight operation, and would not be going out at night. He said there will not be ATV's all over the place and they are not out there every day.

Mark Faherty the Science Coordinator at Mass Audubon's Wellfleet Bay said he was waiting and see the Natural Heritage Endangered Species Program report. Mr. Faherty did note it would be unlikely that there would be chicks in May, even if it is a really early

nest it would be towards the end of May. He said they are willing to monitor if a pair showed up.

It was suggested to have one ATV per grant site. The routes can be altered if they impact the tidal flats. Peter Burns noted the tracks are erased every tide.

Neil Andres said he does see hesitation from the Recreation Department, but he is working with them and addressing their concerns.

Michael Harnett **MOVED** to continue to November 10, 2014, Mary Zdanowicz **SECONDED.**

ALL IN FAVOR.

Request for Amended Order of Conditions filed by the Town of Eastham. Applicant proposes vehicular access over South Sunken Meadow Beach and tidal areas to shellfish aquaculture growing sites from October through May at property located at South Sunken Meadow Beach, Map 01, Parcel 097.

Russ Sandbloom a grant holder and Neil Andres of the Town of Eastham Department of Public Works were present to speak to the project. Mr. Sandbloom noted that he was required by the state to carry a log. Chairman Smith noted they will need to have the Natural Heritage Endangered Species Program look at the property. He also noted the commission has noting in writing pertaining to any of the request. Chairman Smith noted that ATVs are easier to rescue and have fewer toxins. He noted that Mr. Sandbloom would need to provide all the information requested. James Baughman said there was no information about the plovers and that needed to be submitted in writing. Neil Andres noted that the Eastham Natural Resources Office has no staff for shorebird monitoring.

Michael Harnett **MOVED** to continue to November 10, 2014, Mary Zdanowicz **SECONDED.**

ALL IN FAVOR.

Notice of Intent filed by John and Jane Malloy. Applicant proposes demolishing an existing addition and construction of a larger addition, hardscaping and an outdoor kitchen, foundation plantings and driveway improvements at property located at 25 Bay View Drive, Map 13, Parcel 049.

Jason Ellis of J.C. Ellis Design presented the project and he noted the house is in the one hundred foot buffer zone. Chairman Smith asked for the changes in footprint for the decks and more details on the hardscaping. Chairman Smith also noted that the commission did not permit irrigation for the property. Mary Zdanowicz noted it would be good to have a land surveyor to review the plan. Steven Kleinberg asked about the planting bed in kelp area. Mr. Ellis went over how the limit of work will be set up and noted they will use an orange construction fence. The fence will be set up three to four feet high around the deck. Chairman Smith noted that specificity for the plantings would be good and would like to see the spacing between the blue stone. Mary Zdanowicz noted she would like to see bigger plans and more details on the plantings. She would also like a protocol on the proposed hot tub. Ms. Zdanowicz requested that in area "A" the native plants not be disturbed. The commission noted native plants are used so no irrigation is needed. Ms. Zdanowicz noted that irrigation was not permitted in the past with good reason and there is an analysis as to why it was not allowed. The commission had an extensive discussion on the irrigation system. The houses on Bay View Drive own to the center of the road so planting is at their own risk.

Attorney Ben Zhender had a discussion regarding pressure-treated wood, because it is part of the plan. The commission noted that it would be an issue, because it is not allowed. Attorney Zhender passed out the Tewhey determination issued for the Flaherty house on Harnes Way.

Steven Kleinberg **MOVED** to continue to November 10, 2015, Michael Harnett **SECONDED**.

ALL IN FAVOR.

Request for Amended Order of Conditions filed by Gail Bedoukian. Applicant proposes maintenance pruning, removal of invasive plants and planting native plants, snow fencing, stone revetment reconstruction and driveway expansion at property located at 18 Horton Way, Map 07, Parcel 093A.

Gail Bedoukian was present to speak to the project and noted she would like a pruning plan. She would like to remove the invasive plants that encroach on the native plants. She also expressed concern about the erosion from the revetment. Mrs. Bedoukian noted she also would like to add a fence to catch the sand. Mary Zdanowicz said that the proposal is more than an amendment. The commission noted that pruning is to establish plants and is not for aesthetics. The commission requested clarification on the pruning plan.

Mary Zdanowicz **MOVED** to continue to November 10, 2015, Steven Kleinberg **SECONDED**.

ALL IN FAVOR.

Request for Determination of Applicability filed by Susan Scribner. Applicant proposes construction of a screened porch at property located at 290 Windjammer Lane, Map 19, Parcel 080.

Tim Brady of East Cape Engineering and Susan Scribner were present to speak to the project. The commission noted that no pressure treated wood is allowed to be used.

Mary Zdanowicz **MOVED** to approve for negative determination for reason #3, Steven Kleinberg **SECONDED**.

ALL IN FAVOR.

Request for Determination of Applicability filed by Patrick and Brenda Boyle. Applicant proposes removal of deck and septic system and installation of new septic system at property located at 100 Hucklebery Lane, Map 07, Parcel 344.

Mary Zdanowicz **MOVED** to approve for negative determination for reason #3, Steven Kleinberg **SECONDED**.

ALL IN FAVOR.

Request for Amended Order of Conditions filed by Michael and Barbara Leen. Applicant proposes construction of shed at property located at 15 Bayland Way, Map 17, Parcel 760.

Tim Brady of East Cape Engineering represented the project. The commission asked that Mr. Brady check on the Order of Conditions for the use of fertilizers and write a letter to educate the owner.

Mary Zdanowicz **MOVED** to approve Amended Order of Conditions, Michael Harnett **SECONDED**.

ALL IN FAVOR.

Continuation of Notice of Intent filed by Larry R. and Jo Ann Jasper. Applicant proposes installing a paved driveway using porous asphalt and planting native and non-native plants at property located at 10 Ben's Way, Map 01, Parcel 074.

The applicant requested a continuance until November 10, 2015.

Mary Zdanowicz **MOVED** to continue to November 10, 2015, Steven Kleinberg **SECONDED.**

ALL IN FAVOR.

Continuation of Notice of Intent filed by Carolynn Branthoover. Applicant proposes construction of a permeable paver pool deck and walkway, installation of a bocce court and vista pruning at property located at 140 Eider Lane, Map 16, Parcel 018.

The applicant requested a continuance until November 25, 2015.

Michael Harnett **MOVED** to continue to November 25, 2015, Steven Kleinberg **SECONDED.**

ALL IN FAVOR.

Request for Certificate of Compliance filed by Rosamond H. Thomas for DEP SE 19-1403 for erosion control and sand nourishment at property located at 255 Mary Chase Road, Map 18, Parcel 080A.

The applicant requested a continuance until November 10, 2015.

Michael Harnett **MOVED** to continue to November 10, 2015, Steven Kleinberg **SECONDED.**

ALL IN FAVOR.

Request for Certificate of Compliance filed by Barbara Carlson for DEP SE 19-1347 for septic system repairs and after the fact filing for paving a driveway at property located at 60 Rogers Lane, Map 21, Parcel 069.

The applicant requested a continuance until November 25, 2015.

Steven Kleinberg **MOVED** to continue to November 25, 2015, Michael Harnett **SECONDED.**

ALL IN FAVOR.

Other Discussion

Town of Eastham Library – Removal of Japanese Knotweed special condition

There is more knotweed than was shown on the plan for the project. Steven LaBranche noted that the plan to approach the knotweed needs to be looked. He noted that injecting is the most effective way to stop the knotweed. The area of concern is about half an acre.

The Beach Association – The Beach Association additional findings for approved beach access stairway at Eastham Ave and Crest Ave, Eastham.

Attorney Amy Kwesell and Attorney Sarah Turano-Flores were present. Shana Brogan noted that the commission needs to provide a letter with the finding of facts for the approval of a beach stairway for the Beach Association. Attorney Kwesell noted that there is a court order that no additional information is to be submitted for the stairway or considered by the commission. Chairman Smith noted the commission approved the stairs based on the Wetlands Protection Act and it did not propose any harm to the resource area, so there is no need for additional information to be submitted to the commission. Mary Zdanowicz noted that this should be addressed by Town Counsel.

Attorney Turano-Flores noted the request was given to Town Counsel in June and the judge gave a deadline of December 15, 2014 to have the fact findings submitted. Shana Brogan said she will prepare a letter with the fact finding details that the Conservation Commission based their approval on and will have it ready for the November 10, 2014 meeting.

Michael Harnett **MOVED** to continue to November 10, 2015, Steven Kleinberg **SECONDED**.

ALL IN FAVOR

Fertilizer – Coordination of a public hearing and discussion on creation of a fertilizer regulation

The commission deferred this until November 10, 2015.

Administrative Reviews

Town of Eastham, Great Pond Beach – Installation of a memorial bench at Great Pond Road Beach

The pressure treated wood is to be removed from the bench.

Michael Harnett **MOVED** to approve, Steven Kleinberg **SECONDED**.

ALL IN FAVOR.

Town of Eastham, Cole Road Beach Parking Area – Fill eroded area of parking lot within in the herring run.

The eroded area under the parking lot is to be filled with chink stone.

Steven Kleinberg **MOVED** to approve, Michael Harnett **SECONDED**.

ALL IN FAVOR.

Approval of Minutes

March 25, 2014

Site Visit Minutes

February 25, 2014, June 11, 2014, June 19, 2014, June, 24, 2014, August 26, 2015, September 8, 2014, October 14, 2014.

Michael Harnett **MOVED** to approve, Steven Kleinberg **SECONDED**.

ALL IN FAVOR.

Adjournment 10:17 PM

Steven Labranche **MOVED** to adjourn, Steven Kleinberg **SECONDED**.

ALL IN FAVOR.

Respectfully Submitted as prepared by,


Teena Tilton


Stephen Smith, Chairman
Conservation Commission

5/26/2015